RECEIVED
AUG 06 2008
RICHARD M. BERMAN
U.S.D.J.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: ______
DATE FILED: 8/6/08

LAW OFFICES OF
FREDERICK K. BREWINGTON
ATTORNEYS AND COUNSELORS AT LAW
50 CLINTON STREET, SUITE 501
HEMPSTEAD, N. Y. 11550

TELEPHONE: (516) 489-6959
FACSIMILE: (516) 489-6958

MEMO ENDORSED

FREDERICK K. BREWINGTON

IRA FOGELGAREN

GREGORY CALLISTE, JR
VALERIE M. CARTRIGHT
MILI MAKHIJANI

August 5, 2008

A pre-motion conference is set for 9/25/08 at 9:00 a.m.

SO ORDERED:
Date: 8/6/08
Richard M. Berman
Richard M. Berman, U.S.D.J.

BY FEDERAL EXPRESS
Honorable Richard M. Berman
United States District Court Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: Selinger, et al. v. City Of New York, et al.
Docket No.: 08-CV-2096 (RMB)

This office represents the Plaintiffs in the above-referenced matter. We write the Court regarding Defendant Morgenthau's letter, dated August 5, 2007, wherein Defendant Morgenthau makes his second request for permission to file a 12(b) motion to dismiss the Complaint.

On July 31, 2008, Plaintiff filed an Amended Complaint as per the Order of Your Honor. Though Plaintiffs assert that the original Complaint was sufficiently pled as to Defendant Morgenthau, Plaintiffs submit that the Amended Complaint is even more facially sound (*See* Amended Complaint). In short, the Complaint alleges that Defendants Morgenthau and Quinn, who were employed with the New York County District Attorney's Office at all times relevant to the Complaint, engaged in a series of "unprotected actions" regarding the initial investigation and subsequent arrest and prosecution of Plaintiff Dr, Selinger. *Id*.

More specifically, the Complaint alleges that Defendant Morgenthau and the District Attorney's Office were involved with an unreasonable ongoing investigation of Dr. Selinger *before* and after the criminal process was commenced against Dr. Selinger. *Id*. As a result of this flawed, improper, and grossly negligent actions/investigation of Defendants with respect to Dr. Selinger, Dr. Selinger was subsequently arrested and prosecuted. *Id.* The Complaint asserts that the District

Attorneys were aware that they lacked probable cause against Dr. Selinger from the outset. Id. The Complaint alleges that the District Attorneys, with knowledge that they had insufficient evidence against Dr. Selinger, utilized damning evidence related to other Co-defendants in order to prejudice Dr. Selinger and assure that Dr. Selinger would be indicted. Id. In addition, the Complaint alleges that the District Attorneys had malicious motives for seeking the prosecution of Dr. Selinger, which were not related to their official duties as prosecutors. Id.

In the above regard, as the Court is aware, prosecutors cannot benefit from a defense of absolute immunity - especially in the context of a 12(b)(6) motion to dismiss - "when it may not be gleaned from the complaint whether the conduct objected to was performed by the prosecutor in an advocacy or an investigatory role . . ." Infra. Further "when a district attorney functions outside his or her role as advocate for the People, the shield of immunity is absent." *Hill v. City of New York*, 45 F.3d 653, 666 (2nd Cir 1995); *see also, Carbajal v. County of Nassau*, 271 FSupp2d. 415, 421 (EDNY 2003). Given the fact that the Complaint alleges involvement in the investigation by Defendant Morenthau prior to the arrest of Dr. Selinger, "a prosecutor's conduct prior to the establishment of probable cause should be considered investigative" and outside the scope of protection of absolute immunity. *Zahrey v. Coffey*, 221 F3d. 342, 347 (2nd Cir 2000).

It is important to note that despite the clear changes made to the Complaint, Defendant Morgenthau's most recent arguments to Your Honor in support of his application to file a 12(b) motion essentially mirrors the arguments that Defendant Morgenthau's made regarding Plaintiffs' initial Complaint. Thus, as it appears that Defendant Morgenthau seeks to file a motion to dismiss regardless of the sufficiency of the Complaint, and as Plaintiffs are aware that they cannot prevent Defendant Morgenthau from filing a motion to dismiss, Plaintiffs respectfully defer to the Court for a briefing schedule.

We thank the Court for its attention and assistance in this matter.

Respectfully,

GREGORY CALLISTE , JR

:GC/cg

Cc: Michael Morgan, Esq. (By fax [212] 335-9288)
Brian Maxey, Esq. (By fax [212]788-9776)